Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1977

No. 77-456

Vernon D. Patch, M.D., et al,

Plaintiff-Petitioners

v.

Kevin H. White, et al,

Defendant-Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1977

No. _____

Vernon D. Patch, M.D.,
Anthony E. Raynes, M.D.,
Lawrence F. Berley, M.D.,
Joanne Simon, Jane S. Murphy,
John Doe, and James Coe,

Plaintiff-Petitioners

v.

Kevin H. White, as he is Mayor of the City of Boston and Acting Commissioner of Health and Hospitals

Herbert P. Gleason, as he is Chairman of the Board of Health and Hospitals, and as he is President of Trustees of Health and Hospitals of the City of Boston, Inc.,

Leon White, Mary Fidler, George Munoz, Michael McCusker, Doris Graham, John Vitagliano, and William Morrissey, as they are or were members of the Board of Health and Hospitals and as they are members of Trustees of Health and Hospitals of the City of Boston, Inc.

David L. Rosenbloom, Acting Executive Director of the Department of Health and Hospitals,

Defendant-Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Plaintiff-Petitioners respectfully request this Court to issue a writ of certiorari to the United States Court of Appeals for the First Circuit to review its Judgment in the above-captioned case.

CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is not officially reported and is set out in Appendix A, pages A1-A17. The opinion of the United States District Court for the District of Massachusetts is also not officially reported and is set out in Appendix B, pages B1-B5.

JURISDICTION

The Judgment of the United States Court of Appeals for the First Circuit was entered on April 25, 1977. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) to review that judgment. No request for rehearing was made in that court.

QUESTIONS PRESENTED

1. Whether drug-dependent patients terminated without notice or hearing from a drug treatment program that is publicly funded and operated have a right to invoke procedures required by federal regulations and constitutional due process whether they are terminated individually or as a group?

2. Whether the Medical Director and patients of a drug treatment program have a right to require treatment once begun to continue in accordance with contractural assurances made by the Medical Director as a condition of receiving federal funding?

3. Whether the discharge of the Medical Director of a publicly funded drug treatment program without notice or hearing as required by city ordinance deprived him of property rights under the Due Process Clause of the Fourteenth Amendment?

4. Whether the firing of a public employee who refuses to participate in a scheme involving the diversion of hundreds of

thousands of federal dollars and who files a lawsuit to protect his own rights and the rights of others violates the employee's rights under the First Amendment?

STATEMENT OF THE CASE

The City of Boston Drug Treatment Program (Program) was established in 1970 to provide drug treatment and rehabilitative services for drug addicted and drug dependent persons in the Boston area. The Program was funded initially by the City of Boston and offered only limited services. However, in response to the nationwide epidemic of drug abuse and heroin addiction, the Program received substantial federal funding in 1972, in the form of a four million dollar eight-year grant from the Department of Health, Education and Welfare (HEW). This grant was awarded to Trustees for Health and Hospitals for the City of Boston, Inc. (Trustees), the private grant-receiving arm of the City's Department of Health and Hospitals whose Board membership is co-extensive with that of Trustees. Dr. Vernon Patch, the Program's Medical Director was designated by HEW to be Project Director for the grant. In accepting this designation, Dr. Patch accepted the specific obligation to comply with applicable federal statutes and policies in effect at the time of the award.

By 1975, with the aid of federal funds, the Drug Treatment Program had expanded to include eleven treatment units and more than six hundred patients.

However, during this period of growth, Dr. Patch became aware that the cost figures being submitted by Trustees to HEW for the operation of the Program were being artificially inflated. He learned, in addition, that portions of the federal funds awarded to the Program were being systematically diverted by Trustees to other unauthorized uses. Dr. Patch believed that Trustees' fiscal irregularities deprived his patients of needed resources, jeopardized further federal funding of the Program, and constituted a fraud on the federal government. He therefore wrote the Mayor in July 1974, met with the Mayor in August 1974, and wrote Corporation Counsel in September 1974 to notify them of the situation and request their advice. No response was forthcoming.

By July 1975, the federal government had become aware of the situation and had ordered a suspension of the payment of indirect costs under the grant. On January 6, 1976, the United States General Accounting Office (GAO), following its review of Trustees' books, concluded that Trustees had requested and received excess federal reimbursement and had thereby violated federal guidelines.

In spite of the GAO report, the fiscal irregularities continued. In mid-January, 1976, Dr. Patch was notified by Trustees that in preparing the Program's grant renewal application for the year commencing July 1, 1976, he was to continue to use the artificially inflated figures.

Failure to comply with Trustees' directive, he was told, would result in Trustees' refusal to process the application and forward it to HEW. This would mean the dismantling of the Program. Dr. Patch was also informed that four of the eleven treatment units, including both of the Program's inpatient units, were to be closed by February 20. All inpatients in those units were to be released by that date and all staff members were to be discharged. Dr. Patch knew that such an abrupt termination of services violated the specific assurances which both he and Trustees had given to HEW as a condition of further funding of the Program. Specifically, they had guaranteed in that year's annual grant application that all eleven treatment units would continue to operate through June 30, 1976, and that the City's matching contribution would include the operation of at least one inpatient unit.

Once again, Dr. Patch reminded Trustees of its legal obligation to keep the units open. He also reminded them that a grant application with inflated indirect costs was improper and illegal. When Trustees refused to change its course, this action was commenced on February 20, 1976 in the Federal District Court of Massachusetts. The original plaintiffs included Dr. Patch and five staff members of the Program suing on behalf of themselves and the Program's other staff members and patients to enforce Trustees' obligations and to prevent the closure of the four units. Plaintiffs also requested that the

Program be placed in receivership. Defendants were the Mayor and Corporation Counsel of the City of Boston, members of the City's Board of Health and Hospitals (and Trustees), and the Executive Director of the Department of Health and Hospitals (and Trustees).

The District Court denied plaintiffs' motion for a temporary restraining order, and the four units including both inpatient units were closed with remaining inpatients discharged. Following additional hearings and while the District Court decision on the merits was pending, Dr. Patch was summarily dismissed by defendants as Medical Director of the Program and as Project Director under the federal grant. Plaintiffs thereupon amended their complaint to include causes of action relating to Dr. Patch's discharge. In addition, two pseudonymous patients joined the action on behalf of the 600 patients enrolled in the Program.

On June 30, 1976, the District Court dismissed plaintiff's complaint, ruling that the original plaintiffs lacked standing to sue and that the two patient-plaintiffs, while having standing, were without a remedy under federal law. The Court further ruled that Dr. Patch's discharge did not violate any of his rights.

On appeal, the Court of Appeals for the First Circuit affirmed, holding that plaintiffs had failed to state a claim upon which relief could be granted. This petition for writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

This petition raises important questions concerning the administration of federal grants, the legal responsibilities of those charged with disbursing grant funds and directing grant activities, and the rights of beneficiaries of federal grants. The Court should entertain this Petition to redress significant error made by the Court of Appeals below; to resolve conflicts which now exist among the federal circuits relative to the procedural and substantive claims of patients whose benefits have been summarily terminated; and to respond to issues and delineate rights never previously addressed by this Court.

The issues here involved present vital questions relative to the rights of drug dependent persons to continued treatment once their treatment has begun. They also raise the frightening spectre of judicial indifference to the plight of the rare public employee who is willing to risk his career and his reputation to assure compliance with federal law and to prevent the fraudulent diversion of federal funds. Resolution of these issues is crucial not only to petitioners, but to all others who look to the federal judiciary for relief when waste and dishonesty involving federal funds threaten the very programs they were earmarked to support.

1. Plaintiffs Have a Cause of Action for Both Procedural and Substantive Violations of Their Federal Rights as a Result of Trustees' Actions in Abruptly Closing Four Drug Treatment Centers.

A. Procedural Violations

The abrupt closure of the treatment units and the sudden termination of patients without any prior written notice or administrative review has violated pre-termination rights specifically guaranteed to Program patients by the Drug Abuse Office and Treatment Act of 1972 and by federal regulation promulgated thereunder. The regulation states as follows:

> [I]n any case in which a decision is made that a patient's treatment . . . (is to) be terminated or substantially changed . . . the patients shall be given written notice of this fact and the right to have such decision reviewed. 21 C.F.R. §1402.03(f).

The Court of Appeals declined to apply this regulation to cases where entire units were being closed. The Court stated that since such decisions were of a legislative nature, no pre-termination hearing was necessary. However, so restrictive an interpretation of 21 C.F.R. §1402.03(f) is not supported by the regulation on its face. To the contrary, the language is unmistakably clear: notice and review are to be afforded in "any case" in which a

patient's treatment is to be terminated or substantially changed. No distinction is mde between cases of a quasi-legislative and a quasi-adjudicative nature. Procedural fairness must be accorded regardless of whether an entire unit or a single patient's treatment is being terminated. In either case, the patient is severely impacted. Arbitrary conduct with respect to a class of individuals -- drug dependent persons requiring inpatient care -- is no less a danger than arbitrary conduct in the case of a single individual.

Further, the Court of Appeals opinion conflicts with a recent case in the Second Circuit involving a similar regulation. Glover v. McMurray, 361 F.Supp. 235 (S.D.N.Y. 1973), remanded with instructions to dismiss, 487 F. 2d 403 (2d Cir. 1973), vacated and remanded, 417 U.S. 963 (1974), remanded, 507 2d 1325 (2d Cir. 1974). Plaintiffs in Glover were a group of publicly-funded day care centers joining together with the parents and children who received their services. Defendants were the public officials administering the day care program who were seeking to terminate several of the centers without providing notice and hearing to the recipients under federal regulation. In Glover, as here, there was no question that the regulation was not followed; the issue was whether it was applicable. Defendants claimed that the regulation was not applicable where entire centers were being terminated. The District Court rejected this argument.

> [T]he decision to close the centers without offering immediate alternative day care services . . . affect[ed] the claims of the parents and children who used the centers, and therefore triggered the fair hearing provisions. Id., at 243.

While the Second Circuit vacated this decision on appeal, the United States Supreme Court reversed the Second Circuit and ordered the matter remanded for further hearing.

Here, as in Glover, no alternative provisions were made available for patients when the four treatment units were closed. Numerous patients were released during the several weeks prior to February 20, and five inpatients were still being treated in the units on the day they were finally closed. It is inconceivable that the protections of 21 C.F.R. §1402.03(f) were not intended to apply when patients' health and welfare were so drastically affected.

In addition to their rights to prior notice and hearing under federal regulation, plaintiffs are entitled to constitutional protection under the Due Process Clause of the Fourteenth Amendment. Plaintiffs rely upon the principles set forth by this Court in Goldberg v. Kelly, 397 U.S. 254, 261-2 (1970):

> The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be condemned to suffer grievous loss....

> To cut off a recipient in the face of...'brutal need' without a prior hearing of some sort is unconscionable, unless overwhelming considerations justify it.

The principles articulated in Goldberg apply equally to patients receiving needed medical treatment, since "...medical care is as much a basic necessity of life to an indigent as welfare assistance." Memorial Hospital v. Maricopa County, 415 U.S. 250, 259 (1974).

The record here attests dramatically to the "brutal needs" of drug addicted/dependent persons for drug treatment services and the "grievous loss" they suffer when treatment units are closed. Without access to care, these persons are not likely to be able to hold down steady jobs. They are forced back out on the streets where their risk of sickness, infection, and death is vastly increased. To deny these persons needed care is to deprive them of perhaps their only realistic opportunity to lead stable and productive lives.

Nonetheless, the Court of Appeals denied plaintiffs' constitutional claim based on the "fiscal and administrative burdens that . . . hearings would create" (App. A-8). However, plaintiffs do not request a full-scale adjudicatory hearing for each individual patient terminated. All that is sought is a forum in which defendants are obliged to articulate the reasons for their action and to demonstrate that they considered other less restrictive

alternatives to the outright termination of services. In the face of plaintiffs' demonstrated need for those services and the unavailability of therapeutic alternatives, plaintiffs are entitled to something more than Trustees' unilateral and insensitive decision-making process.

B. Substantive Violations

Plaintiffs' substantive claims for federal relief derive primarily from the contractual assurances given by Dr. Patch and the defendants pursuant to federal statutes as a condition for federal funding of the Program. Specifically, both parties guaranteed:

(a) a continuation of the operation of all eleven units throughout the grant year;

(b) the continuation of city matching services toward the operation of at least one inpatient unit;

(c) a continuation of the same level of city support as had occurred during the prior twelve months;

(d) the delivery of all drug abuse services promised in the application;

(e) the availability of drug abuse services without exclusion of any person solely by reason of the ability to pay.

(f) compliance with the provisions of all applicable laws, regulations, and policies relating to the project.

Defendants' closure of the four treatment units violated the foregoing assurances. Dr. Patch was co-signatory to these assurances and his patients were their intended beneficiaries. Thus in suing to enforce compliance with these assurances, plaintiffs brought their case squarely within the doctrine of Euresti v. Stenner 458 F.2d 1115 (5th Cir. 1972). See also Cook v. Ochsner Foundation Hospital 319 F. Supp. 603 (E.D.La. 1970). Plaintiffs in Euresti were intended recipients of health care services who sued to compel a hospital administrator to provide the low-cost services he had promised in exchange for receiving federal Hill-Burton funds. Plaintiffs prevailed in that action.

The Court of Appeals has sought to distinguish Euresti on the basis that while the duty breached in that case "had its source in a federal statute or an interpretive regulation" (App. A-9), the duty breached here was merely contractual. However, the Euresti decision, written by Mr. Justice Clark, was based not only on the Hill-Burton statute but also on specific contractual assurances given by the defendants in exchange for Hill-Burton funding. (See Silva v. East Providence Housing Authority 423 F. Supp. 453, 465 (D.R.I. 1976), where the Euresti decision is specifically interpreted as having relied

on both statute and contract). Here, similarly, plaintiffs' claims are based on contractual assurances derived in accordance with the two statutes under which the Program was funded. Comprehensive Drug Abuse Prevention and Control Act of 1970, 42 U.S.C. §§2688k et seq; the Drug Abuse Office and Treatment Act of 1972, 21 U.S.C. §§ 1120 et seq. Since there is no material basis for distinguishing Euresti from the facts of this case, plaintiffs submit that the First and Fifth Circuits are now in conflict. Plaintiffs are entitled to treatment in accordance with the aforementioned assurances.

The Court of Appeals' rejection of plaintiffs' contractual claims was also explained in terms of preventing an encroachment upon administrative flexibility. The Court feared that "If third parties had the right to enforce the terms of the grant, it would effectively preclude the [federal grantor] from permitting changes in any grantee's program during a project period" (App. A-11). However, any focus upon "administrative flexibility" sidesteps the thrust of this action.

At stake here is plaintiffs' right to continued treatment. The record amply demonstrates that methadone maintenance is viewed by the federal government and by the medical profession as a life-saving medical treatment for a life-threatening medical illness. Barbiturate addiction is similarly viewed as a life-threatening medical illness and withdrawal from

barbiturate addiction is considered a medical emergency for which the only acceptable treatment is detoxification on an inpatient basis. Among the units abruptly closed on February 20, 1976 was the only Program unit which provided this treatment. Its closure has entirely eliminated the possibility of treating barbiturate addicts in the Program. Patients entered the Program with the hope of conquering a condition they were powerless to overcome alone. In the case of those addicted to heroin, treatment required immediate placement on methadone -- a drug from which patients could be gradually withdrawn under strict medical supervision. In embarking on such a long-term commitment, patients relied on the expected continuity of the Program as reflected both in the duration of the grant and the assurances which were made to receive it. Certainly for these patients already receiving treatment and now left without any viable therapeutic alternative when the Program units were closed, the interest in enforcing contractual assurances far outweighs any interest in administrative flexibility.

It is well established that where patients have reasonably relied upon a course of treatment at a facility which offers such treatment on a regular basis, they have a right to receive that treatment. See Wilmington General Hospital v. Manlove, 174 A.2d 135 (1961). Thus, as recipients of Program services, plaintiff-patients have a right to expect the

continuation of services assured to them by agreement under the federal grant.

It is also well established that where a provider of medical services has begun to render care to a patient, the abrupt termination of care without affording the patient a therapeutic alternative constitutes medical abandonment. Johnson v. Vaughn, 370 S.W.2d 591 (1963). As Medical Director of the Program and as co-signatory on the federal grant, Dr. Patch had both the right and the duty to continue to deliver services in accordance with his best medical judgment and the specific assurances of the grant.

2. Dr. Patch's Summary Discharge Deprived Him of Fundamental Rights Guaranteed Him by the First and Fourteenth Amendments.

Dr. Patch joined the medical staff of Boston City Hospital (BCH) in 1962 as an employee of the City of Boston and as a member of the BCH Department of Psychiatry. He remained an employee of the City until his dismissal in March 1976. Throughout this fourteen year period, Dr. Patch worked under the supervision and direction of the Director of the Department of Psychiatry with ultimate responsibility to defendants Board and Executive Director who determined his appointment and yearly salary. Dr. Patch was listed in the annual City budget as a "permanent" employee.

Early in 1970, while serving on the BCH staff, Dr. Patch was asked to develop

a drug program for the City. When the Program received City funding, Dr. Patch was appointed its first Director. Thereafter, as federal funds became available for drug treatment, Dr. Patch prepared and negotiated all of the Program's federal grant proposals and submitted these proposals through defendants Board and Executive Director. HEW's eight-year grant to the Program in 1972 was awarded to defendants as grantees and to Dr. Patch as both Medical and Project Director.

It is in this context that the summary dismissal of Dr. Patch without notice or hearing only one month after he initiated this lawsuit has violated his property rights under the Due Process Clause of the Fourteenth Amendment and his rights of free speech under the First Amendment.

In the courts below, Dr. Patch rested his due process claim upon numerous factors, each of which created and supported his expectation of continued employment with the City. These included: municipal ordinances; federal grant provisions; federal regulations; and the Medical Staff bylaws of BCH. In rejecting Dr. Patch's claim, the District Court considered only the BCH bylaws and did not even discuss any of the other factors cited. The Court of Appeals misinterpreted this silence as rejection and consequently applied an incorrect standard in reviewing the District Court decision. As a result, Dr. Patch has never received due consideration of his property claim. The municipal ordinance exemplifies the problem.

The ordinance makes unmistakably clear that any "subordinate" of a City department cannot be discharged without cause, C.B.C. St.5, §109, and thereby has a protected property interest. See Bishop v. Woods 426 U.S. 341 (1976). The term "subordinate" is defined to include "all assistants, deputies, clerks, and other officers appointed by an officer or board in charge of a department and paid a yearly salary". C.B.C, St. 5, §108. Inasmuch as Dr. Patch was appointed by defendants Board and Executive Director, was paid a yearly salary, and served under the Director of the Department of Psychiatry, he was without question a "subordinate" employee. Nevertheless, without citing any municipal or state authority in its support, the Court of Appeals construed the ordinance in so restrictive a manner as to deny Dr. Patch the benefit of its protection. A writ of certiorari is sought to cure this manifest error.

With respect to Dr. Patch's First Amendment claim, the Court of Appeals labeled it "extremely tenuous" (App. A-16), suggesting that defendants' summary dismissal of Dr. Patch was not unreasonable in the light of the criticism and lawsuit which he had initiated. Should such a decision be allowed to stand, its implications will be staggering for public service. It will chill the future exercise of First Amendment liberties by employees who learn of their employers' dishonesty. And it will severely detract from current efforts to

> protect our . . . employees from harrassment and dismissal if they find out and report waste or dishonesty by their superiors. The . . . case where a dedicated civil servant was fired from the Defense Department for reporting cost-overruns must never be repeated. (Statement of President Jimmy Carter at "Whistleblowers' Convention", Washington, D.C., October 3, 1976).

When Dr. Patch first learned that Trustees had artificially inflated their costs to HEW and that federal funds had been diverted from the Program, he was confronted with a dilemma. He knew that his participation in such a scheme would violate the assurances he had given the federal government, deny his patients needed care, and contribute to what he regarded as criminal fraud. On the other hand, he also knew that to report defendants' dishonesty was to place his employment, income, status, and reputation squarely on the line. First he tried bringing his concerns to the attention of Program and City officials. However, his efforts met with either no response or a warning that his refusal to go along with their directives would effectively terminate the Program. When he took the matter to federal officials, he was advised that the law forbade compliance with defendants' directives. As a result (and contrary to the statement by the Court of Appeals (App. A-4)), Dr. Patch chose steadfastly to refuse to prepare any submission to the federal government which

involved a distortion of Program costs. It was when this refusal brought him into a position of unavoidably direct confrontation with his superiors that Dr. Patch sought judicially to prevent the unlawful closure of the treatment centers and to ask for a declaration of his rights and responsibilities.

The federal government's interests have now been fully served by the reports of the General Accounting Office and the Boston Finance Commission (See Appendix C) which detail Trustees' fiscal irregularities. Even though Dr. Patch's charges have now been proven accurate, he has received no vindication from the federal judiciary -- his forum of last resort. Certiorari is sought in this case "to prevent a clear miscarriage of justice". Roto-Lith, Ltd. v. F. P. Bartlett & Co. 297 F.2d, 497, 500-01 (1st Cir., 1962).

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

VERNON D. PATCH, et al.,
Plaintiffs, Appellants,

v.

KEVIN H. WHITE, et al.,
Defendants, Appellees.

Before Coffin, Chief Judge,

Moore and Aldrich, Circuit Judges.

April 25, 1977

COFFIN, Chief Judge. This case presents the unhappy tale of the administrative and other problems which Boston's Drug Treatment Program encountered during the years 1974 through 1976. While the case raises a number of delicate questions of social policy and may also present some substantial issues of state law, it does not, in its present procedural posture, present any federal claims upon which relief may be granted. We affirm the district court's dismissal of plaintiff's complaint.

The allegations of plaintiffs' complaint, which we assume to be true, reflect the following. Boston's drug program was established in 1970 under the sponsorship of the city's Department of Health and Hospitals (Department) to provide drug detoxification, methadone maintenance, and rehabilitative services for drug addicted and drug dependent persons. One of the plaintiffs, Dr. Vernon Patch, was appointed director of the program. Initially the program was funded entirely by the city of Boston, but soon after it was established, the program began receiving a number of federal grants. The most significant of these was an eight year, four million dollar grant awarded by the National Institute of Mental Health (NIMH) pursuant to the Comprehensive Drug Abuse and Control Act of 1970, 42 U.S.C. §§ 2688k et seq. Although this Act was amended in its entirety by the Community Health Centers Amendment of 1975, 42 U.S.C. §§ 2689 et seq., the amended statute explicitly authorized grantees like the city of Boston to continue receiving funds under the terms of the prior law. Id. § 2689b(e)(1). Through the combination of federal and municipal support, the program by 1974 included eleven units: two in-patient detoxification centers, six out-patient clinics, a halfway house, a sheltered workshop/work training program for heroin addicts, and a 24 hour drug information service "hot line".

The NIMH grant, the administration of which was transferred to the National Institute on Drug Abuse (NIDA) in 1974, had to be renewed annually. The city's renewal applications were filed by the Trustees of the Health and Hospitals of the City of Boston, Inc. (Trustees), a nonprofit corporation established by law to apply for grants and hold property for the benefit of the Department. As program director, Dr. Patch would prepare the renewal applications for the Trustees, negotiate federal approval, and attempt to ensure that the drug program complied with all applicable laws and regulations. The Trustees, however, had final control over the renewal applications.

Sometime during 1974, Patch became aware of some fiscal irregularities in the administration of the program. Of greatest concern to him was that the Trustees had been billing the federal government for the city's general overhead expenses ("indirect costs") at the "on-site" rate that applied to services performed at the Boston City Hospital. In fact, most of the city's services had been performed at other locations, and the city should have been reimbursed at a lower "off-site" rate. Patch took this matter directly to the Mayor, labelling it a "multi-million dollar scandal", but the mayor's office took no action. Thereafter, Patch discussed the problem with several federal officials who had become aware of it and with the grants management office of the Trustees, and decided that it was

imperative that an indirect off-site cost rate be included in all future grant applications. However, David Rosenbloom, the acting executive director of the board of the Department told Patch that the Trustees would not submit any grant application unless it provided for reimbursement at the on-site indirect cost rate, and Rosenbloom directed Patch to prepare the applications accordingly. Patch responded by informing Rosenbloom that such action would jeopardize the funding for and existence of the drug program and that it would constitute a fraud on the federal government. However, after consulting with the responsible federal officials, Patch complied with Rosenbloom's directive.

A second problem which was of concern to Patch was that the Trustees, which is a juridical entity independent of the city of Boston, had frequently failed to transfer federal funds to the city. This matter too had come to the attention of the federal officials, and Patch discussed the problem with them. Patch was particularly distressed by the fact that many members of the board of the Trustees were also city officials and thus in a conflict of interest situation.

Notwithstanding these problems with the administration of the program, the applications for the fiscal years July 1, 1974 to June 30, 1975 and July 1, 1975 to June 30, 1976 were both approved, and the program continued, subject to several conditions. One of these conditions was that

the city guarantee the continued operation of all eleven program sites for the coming fiscal year.

However, on January 26, 1976, Rosenbloom advised Patch that it was necessary that four units of the program be closed down on February 20, 1976: the two inpatient clinics, the hot line, and the sheltered workshop/work training program. Patch resisted this directive in a number of ways: suggesting to Rosenbloom that he could not order such action without formal board approval and strenuously urging that the closings would be contrary to the terms of the federal grant, violative of the federal regulations, and contrary to the needs of the program's patients. When these protestations proved unavailing, Patch and several other employees of the program instituted an action in Massachusetts Superior Court on February 18 to enjoin the closings and to obtain other relief. When the state court refused to enter a temporary restraining order, plaintiffs filed a similar complaint in federal court, naming certain members of the boards of the Department and the Trustees as defendants. Count one of the complaint challenged the closure of the four units of the drug program on the ground that it violated the rights of the program's patients and prayed for temporary and final injunctive relief enjoining the closings. Count two charged the defendants with mismanagement that jeopardized the continued existence of the program and prayed for the appointment of a

receiver to take control of the assets of the Trustees. Count three charged that those defendants who were both members of the board of Trustees and members of the board of the Department were guilty of a conflict of interest in violation of Massachusetts law. The district court denied all temporary relief, and the four units were closed.

While the suit was still pending, on May 22, 1976, Rosenbloom summarily discharged Patch as director of the program. Patch thereafter requested a hearing before the full board, but this request was denied. Plaintiffs then filed an amended complaint which added a fourth count challenging the summary discharge on the sole ground that Patch had had a right to a hearing under the Fourteenth Amendment. The amended complaint also added two of the program's patients as party plaintiffs. Defendants then filed a motion to dismiss for failure to state a claim upon which relief could be granted. Following a hearing, the district court granted the motion as to counts one, two, and four and declined to exercise pendent jurisdiction over count three. This appeal followed.

Plaintiffs' challenge to the city's decision that eliminated the four treatment units from the drug program is based upon two distinct grounds. First, they contend that the city officials failed to follow the required procedures in reaching the decision to close the units. They

urge that the operations at these units could not lawfully be terminated without first affording each affected patient a right to be heard. Although plaintiffs also rely on the due process clause, this contention is based primarily upon a federal regulation that provides that when "a decision is made that a patient's treatment . . . [is to] be terminated or substantially changed . . . the patient shall be given written notice of this fact and the right to have such decision reviewed." 21 C.F.R. § 1402.03(f).[1] While we assume, arguendo, that this regulation applied to the city's drug treatment program, that patients have a private right of action to redress violations of

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1. Plaintiffs also urge that the city officials acted in violation of 42 C.F.R. & 52.20(b) which provides that a grantee, who is "uncertain as to whether a change in a project" is permissible under the regulations, shall refer the question to the Secretary for a final determination. We note first that it is far from clear that this regulation has any applicability to the drug program, since 42 C.F.R. Part 52 appears to cover only grants for research projects. But even if applicable, we find it impossible to believe that this regulation, the violation of which arises because a grantee acted when "uncertain", creates any private rights.

the regulation, and that the decision to close the four facilities "substantially changed" the treatment being received by some of the program's patients, we agree with the district court's conclusion that the regulation does not apply to decisions to close some units in a program. Such decisions are of a legislative nature, involving, as they do, the policy judgment as to whether the benefits to be derived from the continued operation of the units outweighs the costs. There is nothing in the regulation that suggests it was intended to create a forum to debate such issues of policy. The hearings for which the regulation provides must by their nature be narrow in scope, focusing on the adjudicatory fact whether a patient's situation has so changed that it is no longer appropriate for him to receive a certain type of treatment. There is no warrant for interpreting the regulation as affording the patients a legislative type hearing on issues of policy.[2]

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2. Insofar as plaintiffs also rely upon the due process clause, the short answer to their contention is that the fiscal and administrative burdens that such hearings would create far outweigh the risk that the responsible officials would erroneously conclude that the facilities should be closed. See generally Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

Second, plaintiffs urge that the city committed a substantive violation of federal law by closing the four units and that they, as the intended beneficiaries of the federal grant, should have a right of action to redress the wrongful acts. The sole basis for their claim that the reconstituted drug program is contrary to federal law is that the "contract" between the federal government and the Trustees provided that the four units would operate through at least July, 1976. The district court assumed that the city's actions were in fact violative of the terms of the federal grant, but it concluded that plaintiffs, as nonparties to the contract, had no right to enforce its provisions against the city.

Plaintiffs argue that the district court erred in failing to imply a private right of action on their behalf under the governing federal statute. They reason that they are, or at least include, the intended beneficiaries of the federal grant program and that they should have the right to force the city to comply with its legal obligations thereunder. Plaintiffs' position might be well take in a case in which the duty allegedly breached had its source in a federal statute or an interpretative regulation. Compare Euresti v. Stenner, 458 F2d 1114 (5th Cir. 1972) (patients have right of action to compel grantee hospitals to comply with provisions of the Hill-Burton Act). Private rights of action are often inferred

to ensure the implementation of Congresionally (sic) established federal policies. See generally Cort v. Ash, 422 U.S. 66, 78 (1975). Here, however, the elimination of the four units from the city's drug program was in no way inconsistent with any provision of the authorizing statutes, since nothing therein required grantees to have the specific types of treatment facilities which the city discontinued.[3]

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3. Plaintiffs do argue that the closing of the four units violated 21 U.S.C. § 1174, but this argument has no merit. That section provides only that "drug abusers who are suffering from emergency medical conditions shall not be denied [treatment in federally funded hospitals] solely because of their drug abuse or drug dependence." It does not create any obligation that such hospitals have specific types of treatment facilities or treatment programs.

If, as plaintiffs allege, Boston hospitals have violated § 1174, there are administrative or other remedies which possibly may be pursued. But these violations do not permit plaintiffs to challenge the decision to terminate the four units of the drug program.

The only possible theory upon which plaintiffs could have a right of action is that they are third party beneficiaries of the federal grant contract. But, assuming that there are circumstances in which the violation of a federal grant contract can give rise to a right of action by nonparties thereto, we see no basis for the recognition of such a right of action here. Common law contract principles would not support one. There is no indication in the documents or otherwise that the federal government contemplated that the city's performance of its obligations would bestow the kind of benefits on plaintiffs that would render them something other than "incidental beneficiaries" to the contract. See 4 Corbin on Contracts § 775. More significantly, the recognition of a third party action would substantially reduce the federal officials' flexibility in administering grants like the one involved in the case at bar. If third parties had the right to enforce the terms of the grants it would effectively preclude the NIDA from permitting changes in any grantee's program during a project period. Since it strikes us as highly desirable that administrative flexibility exist, we decline to allow a third party beneficiary action, and we affirm the district court's dismissal of count one.

In count two, plaintiffs alleged that the Trustees' mismanagement of the federal funds had jeopardized continued federal funding and prayed that the Trustees be placed in a receivership. Although we

must assume that plaintiffs' contentions regarding the actions of the Trustees are true, we agree with the district court's conclusion that the plaintiffs have no federal right of action. While plaintiffs conceivably have a state law claim akin to an action for breach of a fiduciary duty, they cannot state a federal claim for relief unless they have alleged the breach of some duty created by federal law. The only possible source of such a duty is the Comprehensive Drug Abuse and Control Act of 1970. Although its principal objective was to benefit drug dependent persons, that Act makes clear that whether a municipality is to receive federal funds is a matter that is committed exclusively to the responsibile federal and local officials. There is no warrant for interpreting this Act as creating a federal right to require that municipal officials manage city affairs in such a way that the likelihood of continued federal funding is enhanced.

We also agree that count three was properly dismissed. Even assuming that this state law claim arose from the same "nucleus of operative facts" as did counts one and two, the district court unquestionably had the discretion to decline to exercise pendent jurisdiction over count three after dismissing counts one and two. See United Mine Workers v. Gibbs, 238 U.S. 715 (1966).

The final issues in this appeal arise from Dr. Patch's discharge as director of

the drug program. Count four of the amended complaint challenged this discharge on the sole ground that Patch was denied the process which was his due under the Fourteenth Amendment. Dr. Patch recognizes that under presently governing federal law, see Bishop v. Woods, 426 U.S. 341 (1976), he had no federal right to procedural safeguards unless state or municipal law created some kind of entitlement to continued employment. See also Board of Regents v. Roth, 408 U.S. 564 (1972). He refers to several different sources for the proposition that he had a substantive right to continue as director of the program. The district court rejected each claim, and we find no error.

Dr. Patch places his principal reliance on a bylaw of the Boston City Hospital which guarantees that no staff member of the hospital will have "his appointment or status as a member of the staff" adversely affected without first receiving certain procedural safeguards. While we are willing to assume both that these bylaws have the force of state law and that they afford substantive protections, we fail to see how they are applicable to Dr. Patch's position as director of the drug program. There is no indication in plaintiffs' complaint that the discharge from this administrative position in any way affected Dr. Patch's status as a staff member of the Boston City Hospital, a position he has held since 1963. Although plaintiffs' appellate brief contains a

number of factual allegations not contained in their complaint, they all support the district court's conclusion that his staff appointment at the hospital was entirely independent of his position in the drug program.

Dr. Patch also relies on a municipal ordinance that guarantees that no "subordinate" of a department in the city of Boston will be discharged absent cause. C.B.C. St. 5, § 109. While this ordinance apparently confers substantive protections, we think the district court correctly concluded that it too is inapplicable. The ordinances provide that the term "subordinate" includes only "assistants, deputies, clerks, and other officers, appointed by an officer or board in charge of a department and paid a yearly salary." C.B.C. St. 5, § 108. We cannot say that the district court erred in apparently* concluding that the designation "subordinate" includes only individuals performing ministerial duties within a department and does not refer to individuals like Dr. Patch who have been hired to administer specific programs and are invested with broad discretionary responsibilities.

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* In the opinion as it was presented to the plaintiffs, the word "apparently" was inserted into the text by the use of a caret.

Dr. Patch's other claims to federal due process protection can be treated summarily. The federal regulation he relies upon as creating a "property" interest, 42 C.F.R. § 52.21 seems to be inapplicable to the drug program, see note 1 supra, and does not, in any event, purport to create either substantive or procedural protections for program directors. Compare Arnett v. Kennedy, 416 U.S. 134 (1974). And insofar as Dr. Patch bases his claim upon the damage to his reputation, the short answer is that he has not alleged the kind of damage thereto which is protected by the due process clause. See generally Codd v. Velger, ___ U.S. ___ 45 U.S.L.W. 4175 (Feb. 22, 1977).

Although we have disposed of all the questions plaintiffs raised below, a final issue remains to be addressed. Dr. Patch raises, for the first time on appeal, a claim that his discharge was in retaliation for his having exercised his First Amendment right of free speech. It is elementary that an appellant is not normally permitted to have the benefit of a new theory on appeal. While the court in its discretion may relax the rule to prevent a clear miscarriage of justice, Roto-Lith, Ltd. v. F. P. Bartlett & Co., 297 F.2d 497, 500-01 (1st Cir. 1962), this case strikes us as an inappropriate one to deviate from the normal practice. In light of our recently expressed view that claims of this nature must be prosecuted expeditiously. See Graffals Gonzalez v. Garcia

Santiago, ____ F.2d ___ (1st Cir. March 2, 1977), a party who fails to raise such a claim in the district court is in a poor position to appeal to this court's discretion to recognize procedurally tardy claims.

And we see little likelihood that a miscarriage of justice will result. Dr. Patch's claim is an extremely tenuous one. Assuming that private criticism of the city officials and the act of filing a lawsuit constitute "speech" and also that Patch can show that he was discharged because he engaged in these activities, it is extremely doubtful that the city officials could not establish a sufficient justification for their action. Patch's employment relationship with the Trustees and with the Department seemed to involve the kind of close working relationship for which it can be persuasively claimed that personal loyalty and the confidence of superiors are essential to the proper functioning of the government unit, and under such circumstances the Court has indicated that activities such as Dr. Patch's are permissible grounds for a discharge. See Pickering v. Bd. of Ed., 391 U.S. 563, 570 (1969); cf. Elrod v. Burns, 427 U.S. 347, 367-68 (1976) (plurality opinion). While it might not be proper to dismiss such First Amendment claims when properly raised in the pleadings, the foregoing considerations persuade us that it would be inappropriate to permit Dr. Patch to inject this issue into the case for the first time on appeal.

We thus affirm the district court's dismissal of plaintiffs' amended complaint. We emphasize that this dismissal was of course without prejudice as to any state law claims arising from these causes of action.

So ordered.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

VERNON D. PATCH, ET AL. *
Plaintiffs *
v. * CIVIL ACTION
* NO. 76-690-S
KEVIN H. WHITE, ET AL. *
Defendants *

MEMORANDUM AND ORDER ON MOTIONS TO DISMISS

June 30, 1976

SKINNER, D.J.

This is an action by the Medical Director and various staff members of the City Of Boston Drug Treatment Program to enjoin the closing of various in-patient care facilities formerly operated as part of the Program. After the commencement of this action, the plaintiff, Patch, was summarily discharged as Medical Director of the Program. Thereafter, the Complaint was amended to seek his reinstatement and to add two patients of the Program as plaintiffs, purportedly representing a class.

The obligation of the defendant city officials to maintain the Program intact during any fiscal year is found in an agreement with the United States Department of Health, Education and Welfare under which federal

funds are provided to pay the cost of the Program. The federal agency has not been made a party to the suit and, through the United States Attorney, has informed the Court that it does not desire to enforce the agreement through legal action.

The defendants' motion to dismiss is directed to the standing of the plaintiffs to bring suit. The contract was entered into under the provisions of The Comprehensive Drug Abuse Prevention and Control Act, 21 U.S.C. §§801 et seq., 1101 et seq. This Act provides no private rights.

The contract provides that it may be enforced by the United States. A regulation of HEW provides that a patient is entitled to notice and hearing before his treatment in an ongoing program is terminated.

The plaintiff staff members, including the Director, do not have any express right of action, and they are not within the zone of interest to be protected or regulated by The Comprehensive Drug Abuse Prevention and Control Act. Plaintiff Patch asserts that as a signatory of the agreement he is entitled to enforce it. It is clear, however, that Patch signed as an agent of the City, and the flow of mutual obligations runs between him and the United States, not between him and the City.

The plaintiff Director and staff members also assert a right to sue on behalf of their patients as an incident of the doctor-patient relationship. Given the elaborate

procedural safeguards which Massachusetts attaches to guardianships and conservatorships, it seems unlikely that Massachusetts law attaches such consequences to what could be a relatively casual relationship. The short answer, however, is that these patients were patients of the Program, not of whatever individual staff members might be from time to time assigned to them.

None of the original plaintiffs have standing to sue.

The patients are clearly within the zone of interests protected by the Act. If there were a statutory scheme providing for suit by "aggrieved persons" they would clearly have standing. Bradley v. Weinberger, 483 F.2d 410 (1st Cir. 1973). Some courts have engrafted a private right of action where Congress has provided none, on the theory that Congress did not intend statutory obligations to be unenforceable. The problem is that Congress may very well have intended just that, since its draftsmen know how to provide private rights when they choose.

In Euresti v. Stenner, 458 F.2d 1115 (5th Cir. 1972), and Cook v. Ochsner Foundation Hospital, 319 F. Supp. 603 (E.D. La. 1970), individual potential patients were held to have standing to enforce the obligations of hospitals which receive Hill-Burton Act funds to provide care for the indigent. As previously stated, these cases rest on a hypothesis concerning the intent of Congress which is suspect at least. In the present case, moreover, the regulations

are specifically addressed to the rights of patients. 21 C.F.R. §1402.03(f). These rights are defined in terms of termination of an individual patient from an ongoing program. Cf. Goldberg v. Kelly, 397 U.S. 254 (1970). The inclusion of this specific provision suggests that no broader rights were intended to be implied.

Count II of the Complaint accuses the defendant of fiscal mismanagement and Count III charges defendants White and Gleason with conflict of interest under M.G.L. c. 268A. It is clear from the above discussion that the plaintiffs have no standing with respect to Count II. Count III is a matter of state law. Since there is a pending state action alleging the same grounds, there is no need for this Court to exercise pendant jurisdiction, particularly since the matter is within the special competence of the state courts.

Lastly, the plaintiff Patch says that his discharge should be enjoined because he was deprived of procedural due process in the form of a hearing. The Supreme Court has recently held that a discharged public official has no such right unless the employer failed to satisfy its own procedural requirements. Bishop v. Wood, 44 U.S.L.W. 4820 (June 10, 1976). The By-laws of the Boston City Hospital provide that no doctor shall suffer a change in his status or privileges on the staff of the Hospital without notice. The short answer to this claim is that the allegations of the Complaint do not reveal that the plaintiff's discharge as

Director of the Drug Treatment Program affects either his status or his privileges as a member of the staff of the Boston City Hospital.

Many of the arguments of the plaintiffs, and the affidavits of the plaintiff patients, are in reality addressed to the policy rather than the legality of closing the Program facilities. This Court might well be sympathetic to these claims if it had authority to decide such matters, but it does not.

The plaintiffs' arguments relative to discovery are well taken, but rendered moot by the above.

The Complaint is DISMISSED, and judgment will enter accordingly.

Walter J. Skinner
United States District Judge

REPORT OF THE FINANCE COMMISSION OF THE CITY OF BOSTON ON CERTAIN ASPECTS OF THE MANAGEMENT OF HEALTH AND HOSPITALS FUNDS IN THE CITY OF BOSTON - EXCERPTS

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SUMMARY OF INVESTIGATION

On October 14, 1975, the Finance Commission of the City of Boston voted to conduct an investigation into the accounting by the Trustees of Health and Hospitals of the City of Boston, Inc. ("Trustees Corporation") of public funds under its control including the question of whether the corporation had made prompt and full payment into the City Treasury of all funds payable to the City. At its meetings on November 20, 1975, the Finance Commission authorized, in furtherance of the investigation, the issuance of summonses for the attendance of witnesses and the production of documents. The primary purpose of the investigation was to ascertain whether certain funds received by Trustees Corporation from the federal government to cover costs of activities conducted upon city premises should have been paid to the City of Boston. The investigation included a review of the history and administration of Trustees Corporation, and its relationship to the city.

In the course of its investigation the Finance Commission reviewed the laws which created and authorized the activities of Trustees Corporation. The Commission obtained from the United States Department of Health, Education and Welfare ("HEW") copies of correspondence between it and Trustees Corporation. The Commission received and reviewed relevant records and documents held by Trustees Corporation, other government agencies and former employees of the corporation, including management studies and audits of the corporation. The Finance Commission interviewed several persons and also conducted hearings and received sworn testimony from six witnesses. . . . . .

. . . . . .

OVERHEAD FUND DISPUTE

Since 1965 the principal activity of Trustees Corporation has become the administration of grants (primarily federal). In the typical grant administered by Trustees Corporation, it applies for and obtains a grant from the federal government. The research called for by the grant is then carried out by a so-called principal investigator , which is either an individual or an organization. The grant activity normally takes place either at Boston City Hospital or on other city-owned premises. Trustees Corporation receives payment of its costs for administering the grant which are payable according to federal guidelines. They typically amount to a few per cent of the total grant and are intended to cover personnel and administrative

expenses of the grantee. Additionally, "overhead expenses" are included in the grant to cover the indirect costs incurred in carrying out the grant activity. They include, for example, the costs incurred by the facility used by a grantee when grant activities take place upon the premises of someone other than the grantee (i.e. the costs of rent, heat, utilities and the use of equipment at the facility). In the case of Trustees Corporation, it received substantial amounts of overhead funds from the federal government because the premises of Boston City Hospital and other city-owned facilities were used by the principal investigators in carrying out the different grant activities.

Not only was Trustees Corporation paid overhead expenses from the federal government, but it also received payments from other grantees, particularly medical schools, when the grant activities they were administering took place in city-owned institutions. Trustees' Corporation's balance sheet for its fiscal year ending June 30, 1974, contains an estimated liability to the city for reimbursement of indirect costs of $1,787,000.

The problem which has arisen with respect to the overhead costs for federal grants is what the appropriate disposition of such payments should have been. Whether Trustees Corporation was obliged to turn over to the city the overhead payments it received from the federal government and from other grantees has been a long-standing issue. In fact, as long ago as April, 1971, an Arthur D. Little

Inc., report on the Department of Health and Hospitals ("DHH") of the City of Boston stated as follows (page 23):

> "Research grant funds go either to the DHH Trustees Corporation or to the medical schools. DHH does not benefit from the monies provided for overhead in connection with grants handled through the schools, regardless of the use of DHH resources involved in the grant work."

The Arthur D. Little report then recommends that "DHH should receive an equitable share of grant overhead monies and benefits according to the use made of its resources."

The question of the status of the overhead funds received by Trustees Corporation has been raised in the Price, Waterhouse & Company audits of the corporation's books for the fiscal years ending June 30, 1971-1974. The audit for the years 1971-1972 contains the following statement:

> "Trustees shares in and reports as revenue certain reimbursements for the cost of administration and facilities absorbed by Boston City Hospital. We have been unable to satisfy ourselves that it is appropriate for Trustees to report such reimbursements as revenues."

Note I to the Audit further states: "Revenues of Trustees relating to the facilities and services provided by the Hospital have significantly exceeded expenditures on behalf of the hospital for the two years ended July 31, 1972."

The audit for the two years ending June 30, 1974 notes the following:

> "Trustees changed the manner in which it accounts for reimbursements it receives from affiliated medical schools for indirect costs incurred and absorbed by Boston City Hospital, the use of the facilities at Boston City Hospital, for its projects and expenditures it considers to be made on behalf of the Hospital. Previously these reimbursements were recorded as revenues and the expenditures were recorded as expenses; a charge to operations was not recognized for the facilities used. These changes, which were adopted to reflect Trustees' current understanding of the intention of the granting agencies and affiliated medical schools in making such reimbursements, as well as the intention of Boston City Hospital in providing facilities, result in recording the reimbursements as a liability, the expenditures as a reduction of the liability and recognizing the use of the facilities as an expense.

Although all of the expenditures made by Trustees and charged to the liability to the City of Boston were either for the direct benefit of the

Hospital, or were approved by Trustees' Board as being for the indirect benefit of the Hospital, it is uncertain that this definition of chargeable expenditures will be agreed to by the parties involved."

The city billed Trustees Corporation a total of $2,994,145 for the overhead costs incurred on behalf of Trustees Corporation research projects performed at Boston City Hospital during 1969, 1970 and 1971. However, the city has never made any effort to obtain payment for these years, and it has submitted no bills for any subsequent years. Trustees Corporation's stated liabilities find no counterpart in any record of accounts receivable in the annual reports of the Auditor or of the Department of Health and Hospitals.

On July 24, 1974, Dr. Vernon Patch, then Director of Boston's Drug Program and a professor at Harvard Medical School, wrote Mayor White requesting a meeting "to discuss a multi-million dollar scandal". Dr. Patch testified at the Finance Commission that he met with Mayor White on August 20, 1974, at which time he told the Mayor that for the past several years he had been aware of a problem in the use by Trustees Corporation of overhead funds, and he explained to the Mayor in detail the reasons why he believed that the overhead funds received by Trustees Corporation were payable to the City. According to Dr. Patch, the Mayor assured him that he would have the Deputy Mayor, Robert Kiley, look into the matter and get in touch with

him. Dr. Patch testified that he never heard further about the matter from either the Mayor or from Mr. Kiley.

In early 1975 the HEW Regional Office questioned officials of Trustees Corporation in meetings and by letters regarding the corporation's use of the overhead funds it had received. At first Trustees Corporation claimed that it was billed annually by Boston City Hospital for activities performed at the hospital. Later the General Manager of Trustees Corporation stated in a letter to Dr. Patch, then Director of Boston's Drug Program, that overhead funds received by the Corporation were reimbursed to Boston City Hospital. However, a letter from HEW to Trustees Corporation dated August 6, 1975, makes it clear that Trustees Corporation was claiming that it had spent the overhead funds on behalf of Boston City Hospital rather than directly reimbursing it. This letter further states that Trustees Corporation could not give a full accounting of how it had spent the overhead funds without the expenditure of an inordinate amount of effort.

In July, 1975, HEW suspended the payment of overhead funds on grants to Trustees Corporation, pending the resolution of the question of whether Trustees Corporation had disposed of overhead funds in accordance with applicable federal guidelines.

The Trustees themselves have had doubts about the legal relationship of the corporation to the city and whether the corporation

had the right to accept payment of the overhead costs of Boston City Hospital. At their meeting on November 1, 1972, the Trustees extablished a committee which was charged with returning recommendations on various matters, including:

> "The legal status of the Corporation, with special reference to the Corporation's capacity to receive payment of BCH's overhead costs."
>
> "Policy matters relating to overhead expenses, charges, and both their collection and disbursement."

Again, On December 3, 1975, the Trustees requested the Acting President, Herbert Gleason, to report to them upon the legal nature of the Corporation. The minutes of that meeting contain the following information:

> "Mr. Gleason said the issue is whether overhead money which is paid to an operating foundation must be paid over to the hospital or whether that money can be used by the operating foundation for hospital purposes. It was his contention that all monies have been used for purposes that the Board would have voted to spend them for."

It was then voted "to request a ruling from the Law Department relative to the legality of the expenditure of certain Trustees overhead monies by the Board and a further

clarification of the legal responsibility in this whole area of Trustee funds".

However, whatever private doubts the Trustees have had, their public position is that the corporation's use of the overhead funds was strictly in accordance with its corporate authority to use its property "for any purpose connected with the public health or with any hospital owned and operated by the City of Boston" (St. 1880, c. 174, s.2, as appearing in St. 1965, c.656 s.4). Moreover, in its dispute with HEW, Trustees Corporation has taken the position that its use of overhead funds for health purposes better reflected the intent of the HEW guidelines than if the corporation had paid the fund into the city treasury. The Acting President of Trustees Corporation, in a letter to HEW dated January 9, 1976, set forth the corporation's position as follows:

> "Because it is impossible to pay monies directly to the Department of Health and Hospitals or to the Boston City Hospital which is a part thereof, the Board of Trustees which is by legislative direction (St. 1965, c.656) identical with the Board of Health and Hospitals, has treated the overhead funds which it has received on research grants as a liability to be expended according to the direction of the Board of Health and Hospitals.
>
> As you will see from the enclosed financial summaries, a substantial amount of overhead received

by Trustees ($1,547,000) in the years 1972-1974 had been expended. ($1,215,000) for the purposes of the Department of Health and Hospitals. So will the remaining balance ($332,000).

Trustees believes that it is thus carrying out the purposes which the HEW policies are intended to achieve. If these monies were paid over to the general fund of the City, it is very likely that they would be shared with the Police, Fire and Public Works Department rather than being used to reduce the costs of patient care at Boston City Hospital where these expenses are largely generated."

Despite the suspension by HEW of overhead payments to Trustees Corporation since July 1, 1975, there is evidence that the Acting Executive Director of Health and Hospitals, David Rosenbloom, as recently as last January stated that he would hold up a grant application until a claim was made for full overhead costs. Dr. Vernon Patch, former Director of Boston's Drug Program, testified that he presented an application for a renewal of a grant from the National Institute of Drug Abuse which provided for a waiver of indirect costs because the program would not take place on city-owned property. He further testified that at a meeting with Mr. Rosenbloom on January 19, 1976, also attended by Dr. Patch's assistant, Anthony

Raynes, (who corroborates Dr. Patch's testimony), Mr. Rosenbloom insisted that he would not approve any grant application unless it made provision for the full on-site indirect cost rate.

Mr. Rosenbloom, although he did not specifically refute Dr. Patch's allegations, testified that any delay upon his part in granting filing approval was occasioned by his desire to review the entire overhead payments question and was not motivated by any intent to make unjustified claims for overhead payments. However, Dr. Patch maintains that neither in his meetings with Mr. Rosenbloom nor in their correspondence was there any suggestion by Mr. Rosenbloom that he was delaying the grant solely for the purpose of reviewing this question. According to Dr. Patch, "At no time was there any question about his [Rosenbloom's] demand that the full on-site indirect cost rate must be applied for." Mr. Rosenbloom contends that he wanted to study the administration of the drug program for himself as he had just been appointed as Acting Executive Director. In fact, when the application was approved by Mr. Rosenbloom in March, it did not include a request for the full on-site rate.

It is neither the responsibility nor the intention of the Finance Commission to intervene in a dispute between the federal government and the City of Boston regarding the city's compliance with federal requirements. However, it is a matter of vital interest to the Finance Commission and to the residents of Boston when funds paid for the

use of the city's property and facilities are withheld from the city and expended without either appropriation or proper accountability. The overhead funds received by Trustees Corporation were paid by the federal government and by other grantees to compensate the City of Boston for the use of its property and facilities. Although the Trustees have now conceded that these funds constitute a liability they have never turned over any of this money to the city, nor are they fully able to account for how all of these monies have been spent.

The Board of Health and Hospitals has the general care and control of Boston City Hospital and all other public health facilities in the city. Obviously the use of the city's health facilities for substantial amounts of health research activities could only take place with the permission of the Board. If the Board had received these overhead funds in its municipal capacity it would have been obliged under state law to pay them into the city treasury, and they would thereafter have been available for use only after appropriation. See G.L. c. 44, s. 53. However, the Board claims that it received overhead funds in its corporate capacity and used them in accordance with its corporate powers for the benefit of the City.

EXPENDITURES OF OVERHEAD FUNDS

The Finance Commission has attempted to examine the uses made by Trustees Corporation of the overhead funds to determine to what extent they were in furtherance of

the public health or of any hospital owned or operated by the city. Unfortunately, the records of the Corporation prior to 1974 were, in the words of John Christian, the General Manager, in a "shambles", and they have never been reconstructed. For that reason it is impossible for anyone to know all the uses made of the overhead funds. With regard to the period prior to 1974 this Report has already noted the statement in the Price, Waterhouse audit for the two years ending June 30, 1972, that "Revenues of Trustees relating to the facilities and services provided by the hospital have significantly exceeded expenditures on behalf of the hospital..."

The Finance Commission does not contest the claim of Trustees Corporation that it used overhead funds for public health purposes. However, the Commission has found instances in which the use of overhead funds was of questionable value to the furtherance of public health. In fact, a review of the available minutes of the meetings of Trustees Corporation shows that the Trustees appeared to regard the millions of dollars of overhead funds as monies which they could spend without the need to justify their decisions to either the federal or city governments, and without the need, therefore, to keep full and accurate records.

In the discussion and the votes authorizing expenditures of overhead funds which were recorded in the minutes of the November 19, 1975, meeting of Trustees Corporation, the Trustees approved retroactively, from

April 1, 1973 through June 30, 1975, the payment of the salaries of the public relations staff of the Department of Health and Hospitals, amounting to more than $53,000 and they also approved projected expenditures of $34,000 for the same purpose. The Trustees approved retroactively from July 1, 1973, to June 30, 1975, payment of the salaries of the Commissioner's staff, amounting to more than $14,000 and they approved a projected expenditure for the Commissioner's office of $124,000. The minutes of the meeting, with regard to this item, contain the following:

> "The average yearly expense over the past two years has been $100,333.95. A Board appropriation of $124,223.58 would cover anticipated payrolls to the end of the fiscal period of $120,223.58 (which includes fringe benefits and a Board authorized 8% general cost of living increase), $2,400 of which is to cover anticipated merit increases for employees, and, lastly, at the Commissioner's request, $500 for miscellaneous costs incidental to the operation of his office for local travel reimbursements and the like."

The Trustees also approved a projected expenditure of $15,000 for the Executive Director's office which, according to the minutes, "is used for miscellaneous purposes such as conference attendance and recruitment not budgeted for the City." The minutes further noted that the average annual expense of this item during the previous three years

had been $9,591.25, and that the account had a deficiency of $3,773.75.

At the same meeting the Trustees also authorized retroactively, from July 1, 1972 through June 30, 1975, the payment of more than $39,000 to the retired nurses fund. This money had been used to hire nurses who had previously retired from public employment on pensions. This method of compensation avoided the prohibition in the state retirement law against the rehiring by the city of municipal employees who have retired with pensions.

The payment of the salaries of a public relations staff and assistants to the Commissioner and the establishing of a fund for the use by the Executive Director were items requested for the Department of Health and Hospitals budget which the Mayor did not approve and did not include in his annual budget request, but they were authorized anyway by the Trustees to be paid with overhead funds. In other instances, the salaries of Department of Health and Hospitals personnel were paid by Trustees Corporation before the Department had formally requested that these persons be added to the city's personnel roster. In fact, in the case of Mary Fallon, a Volunteer Worker Administrator, it was explicitly recognized at the time of her employment by Trustees Corporation that the funding of her position might not be approved by the City Council. The June 28, 1972, Minutes of Trustees Corporation states:

"Dr. Sherman informed the Board that this item was eliminated from the Department's 1972 budget, but was resubmitted in the 1972 supplementary budget request. However, there is no assurance that this item will be approved by the City Council and therefore no guarantee of reimbursement to the Trustees."

On one occasion the Trustees authorized a "grant" of $2,000 to the Boston Consumers Council "for a study of the costs of certain pharmaceutical products within the City of Boston." The Consumers Council explained at the Trustees Corporation meeting on April 23, 1970, that the money was to be used to buy drugs. Apparently the then Commissioner of Health and Hospitals, Dr. Andrew P. Sackette, was not willing that this expenditure be publicized, because the minutes of the meeting record that he requested that this matter be kept confidential.

MANAGEMENT AND RECORD KEEPING DEFICIENCIES

In the past eight years Trustees Corporation has had a record of severe management problems and crises marked by personnel disputes, management turnover, a collapse in record keeping and acute cash flow problems. The Price Waterhouse audits for the years ending 1970-1974 are qualified to the extent that they do not express an opinion on the corporation's financial statements. The audit for the two years ending June 30, 1972

finds "the system of internal accounting controls and the accounting records of the General Fund inadequate for the purpose of providing reliable financial information." The draft audit for the two years ending June 30, 1974, finds that "the system of internal accounting controls and the accounting records were inadequate for the purpose of providing appropriate controls over cash and other transactions during the period ended June 30, 1974."

A report by a committee of the Trustees, formed to evaluate the corporation, was presented at the Trustees meeting on October 11, 1972. The report referred to " a dire need of a systematic audit of the Office of the Trustees" and it found a "serious morale problem".

The Finance Commission has heard testimony from two employees and two former employees of the corporation who have confirmed in detail the types of problems referred to in the Price Waterhouse audits. John Christian, the General Manager, testified that the records were in a "shambles" when he took office in January 1974, and that it was not until February of this year that they had been made current and were in order for the period beginning January 1, 1974.

Mr. Christian also stated that the Corporation lacks the capacity and has no plans to reconstruct the records prior to 1974.*

Linda Mills, former Assistant Chief Accountant, testified that she was concerned throughout her employment about management deficiencies of the Corporation, including failure to obtain timely authorization from the Trustees for expenditures, lack of definition or guidelines regarding the relationship of Trustees Corporation and the Department of Health and Hospitals, failure to maintain accounts receivable and accounts payable on a current basis, and recurring cahs flow crises. She felt that her attempts to bring problems to the attention of her superiors were unwelcome and led to a lack of a merit increase which in the normal course she would have received. As she testified:

> "It was a case where I felt that there was something illegal going on, that the corporation was not being run properly, and that's the reason I felt he didn't give me a merit increase."

* Mr. Christian showed Finance Commission staff members the corporation's records for the period 1965-1973. They were piled in a corner of a women's rest room and are obviously unusable.

Ralph LePore, former Director of Purchasing and Materials and still an employee of Trustees Corporation, has had a running dispute with Trustees Corporation management for several years. He has criticized the management of the corporation on a variety of grounds, including its disposition of overhead funds. He was also worried about the possibility of his personal legal liability arising from his authorization of purchases on behalf of the corporation if it should be determined that the corporation was acting beyond the scope of its powers. Mr. LePore brought his criticisms of the operation of Trustees Corporation to the attention of various agencies, including the Boston City Council and the Finance Commission.

It appears that since John Christian became General Manager of Trustees Corporation on January, 1974, there has been a noticeable improvement in the management and record keeping of the corporation. Mr. Christian testified that by February of this year he had succeeded in bringing the records up to date from 1974 onwards. He also testified that accounts receivable and payable are now generally on a current basis and that the corporation is able to handle its cash flow needs even though the federal government has suspended overhead payments. There is still a high rate of employee turnover, but Mr. Christian believes, and the Finance Commission agrees, that this is caused at least in part by reliance upon a personnel system and pay

schedule developed for Trustees Corporation by Paul Dorr in 1972. This plan provides for a high percentage of low paying clerical positions and it is questionable whether the pay scales are competitive for the qualifications required for the positions to be filled.

USE OF TRUSTEES CORPORATION TO AVOID MUNICIPAL REQUIREMENTS

Mr. Gleason told the Finance Commission that he was the architect of the arrangement whereby Trustees Corporation was used to carry out functions of the Department of Health and Hospitals. He said that after becoming a member of the Board of Trustees Corporation he urged that the corporation be used to obtain the same kind of flexibility as that of the Trustees of Boston Public Library. Mr. Gleason states:

> "Yes, to be sure we could be criticized in some respects for doing things to avoid city procedures, but I think it is not a fault. I think we have done so in order to do things, to be able to accomplish things, particularly in a situation where we are frequently in competition with the private sector. We are able to do things as a public agency the Department of Health and Hospitals has not been able to do."

Mr. Gleason believes that without the flexibility of using Trustees Corporation, the Department of Health and Hospitals could never have achieved the accomplishments it did in establishing a community health care system. The particular advantages he listed were greater speed in personnel appointments and in payments than the city's procedures would allow, and the ability to avoid the Civil Service system.

Whatever advantages were perceived in the use of Trustees Corporation, there is no doubt that the city's personnel, fiscal and administrative requirements were repeatedly avoided. In 1974, the Finance Commission objected to the practice of the Department of Health and Hospitals obtaining personnel services by contracting to obtain them from Trustees Corporation. At the Trustees meeting on June 11, 1974, they approved contracts to provide the Department with certain personnel, but they noted that because of the Finance Commission's objections, the positions would in the future be classified in the city's compensation plan.

Whenever the Department of Health and Hospital's personnel are paid for from overhead funds there is no need for a contract with the City, and the positions have been filled without the requirement of advertisement in the City Record or notification of the Finance Commission. In this manner, the Commissioner's assistants, the Department's public relations staff and various other persons have been employed without

regard to Civil Service qualification or to other municipal requirements.

The lack of financial and administrative controls applicable to Trustees Corporation has enabled the Trustees to authorize such matters as (1) retroactive employment, (2) the pledging of the corporation's credit as surety for a $40,000 bank loan to a health center, and (3) repeated instances of expenditures without advance authorization from the Trustees and without any concern for the source of the funds to be used. As a result, all non-grant funds and non-trust funds received by the corporation from any source and for whatever purpose have been held in one bank account and have been subject to expenditure by Trustees Corporation simply on the basis of availability. . . . . .

. . . . . .

RECOMMENDATIONS

(1) Trustees should not pay the salaries of Department of Health and Hospitals personnel except in accordance with the terms of a gift or grant. Nor should the Department take any other action which is designed to permit it to avoid budgetary examination.

(2) The Department of Health and Hospitals should accept responsibility for the future employment of Department personnel and the financing of health programs, which presently are being paid for

by Trustees Corporation from overhead funds.

(3) Trustees Corporation should end at once its practice of permitting the Commissioner of Health and Hospitals to spend the corporation's funds in his own discretion.

(4) Trustees Corporation votes which require the expenditure of funds should always state the source of the funds, and this information should appear in the minutes of the meetings.

(5) The Board of Health and Hospitals should not have as its Chairman or as a member the city's Corporation Counsel.

(6) Trustees Corporation should retain the services of independent legal counsel to advise it upon all matters relating to its legal organization and authority, its relationship to the city, its compliance with all applicable provisions of law and its accountability to other governmental bodies.

(7) Trustees Corporation should obtain an independent legal opinion including, if necessary, a judicial declaratory judgment as to whether the board members are invested with the powers of both corporation members and directors or only those of corporation members. If they are invested with only the latter powers, they should create a board of directors.

(8) Trustees Corporation should pay to the city all overhead funds it receives from the federal government or other grantor for the use of city property and facilities.

(9) Trustees Corporation and the city should notify all grantee institutions which use city property and facilities that payments for its use are to be made to the city and not to Trustees Corporation.

(10) Since Mr. Rosenbloom and Mr. Gleason, speaking for the Board and for Trustees, contend that subjecting the expenditure of these overhead funds to municipal controls would seriously hinder their ability to provide good health care programs, the Finance Commission suggests that the Board seek an amendment to its own enabling statute which would (1) specifically set out the ability of the Trustees to accept such funds on behalf of the city and (2) specifically set out an internal oversight mechanism for dealing with the Trustees for use of these funds (the most obvious one would be for the Board members to be different people from the corporation members and to have the ability to vote on the Trustees programs). The Finance Commission would offer its aid to the Board in seeking such legislation.

Respectfully submitted

FOR THE FINANCE COMMISSION

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Chairwoman

Frederick R.H. Witherby
Esquire

Percy C. Wilson

Barbara Cheney

Supreme Court, U. S.
FILED
OCT 25 1977
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1977

No. 77–456

VERNON D. PATCH, M.D., et al.,
Petitioners,

v.

KEVIN H. WHITE, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

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CITY OF BOSTON PRINTING SECTION

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In the

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77–456

VERNON D. PATCH, M.D., ANTHONY E. RAYNES, M.D., LAWRENCE F. BERLEY, M.D., JOANNE SIMON, JANE S. MURPHY, JOHN DOE, and JAMES COE,

Petitioners

v.

KEVIN H. WHITE, as he is Mayor of the City of Boston and Acting Commissioner of Health and Hospitals,

HERBERT P. GLEASON, as he is Chairman of the Board of Health and Hospitals, and as he is President of Trustees of Health and Hospitals of the City of Boston, Inc.,

LEON WHITE, MARY FIDLER, GEORGE MUNOZ, MICHAEL McCUSKER, DORIS GRAHAM, JOHN VITAGLIANO, and WILLIAM MORRISSEY, as they are or were members of the Board of Health and Hospitals and as they are members of Trustees of Health and Hospitals of the City of Boston, Inc., and

DAVID L. ROSENBLOOM, Acting Executive Director of the Department of Health and Hospitals,

Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

STATUTORY PROVISIONS INVOLVED

42 U.S.C. §291

"The purpose of this subchapter is —

(a) to assist the several States in the carrying out of their programs for the construction and modernization of such public or other nonprofit community hospitals and other medical facilities as may be necessary, in conjunction with existing facilities, to furnish adequate hospital, clinic, or similar services to all their people;

(b) to stimulate the development of new or improved types of physical facilities for medical, diagnostic, preventive, treatment, or rehabilitative services; and

(c) to promote research, experiments, and demonstrations relating to the effective development and utilization of hospital, clinic, or similar services, facilities, and resources, and to promote the coordination of such research, experiments, and demonstrations and the useful application of their results."

* * * *

21 C.F.R. §1402.03(f)

"Notice and review of termination of treatment. In any case in which a decision is made that a patient's treatment to which this part applies be terminated or substantially changed by the program director, the patient shall be given written notice of this fact and the right to have such decision reviewed in accordance with procedures established for that purpose."

* * * *

Bylaws of the Medical and Dental Staff of the Boston City Hospital, Article III, §7(b)(2)

"A staff member whose clinical privileges have been summarily suspended shall be entitled to request that the Executive Committee of the Medical and Dental Staff hold a hearing on the matter within such reasonable time period thereafter as the Executive Committee may be convened in accordance with Article III, Section 8, of these Bylaws."

QUESTIONS PRESENTED

1. Whether the Court of Appeals for the First Circuit correctly affirmed the District Court's dismissal of Petitioners' complaint for lack of subject matter jurisdiction and lack of standing?

2. Whether the actions of the Respondents in closing some units of a drug treatment program were lawful?

3. Whether the discharge of the Petitioner Patch violated any protected property right or any properly raised right to free speech?

STATEMENT OF THE CASE

The Respondents endorse and rely upon the statement of the case set forth in the opinion of the Court of Appeals set forth in the appendix to Petitioners' petition (Pet. App. A-2–A-6).

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISTRICT COURT'S DISMISSAL OF THE COMPLAINT.

1. The District Court lacked jurisdiction over the subject matter of the complaint.

Federal courts are courts of limited jurisdiction. They are empowered to hear only such cases as are within the judicial power of the United States as defined in the Constitution and entrusted to them by jurisdictional grant of Congress. Facts disclosing the existence of jurisdiction must be affirmatively alleged. *Bingham* v. *Cabot*, 3 Dall. 382 (1798). See also, F.R. Civ. P. 8(a) (1), *Turner* v. *President*, 4 Dall. 8 (1799), *Miclau* v. *Miclau*, 58 F.R.D. 207 (1972).

Petitioners here have failed to allege affirmatively a violation of federal law. Below, Petitioners alleged jurisdiction under 28 U.S.C. §§1331, 1334 as an action arising under the Fourteenth Amendment, the Drug Abuse Education Act

of 1970 (P.L. 91-527), and the Drug Abuse Office and Treatment Act of 1972 (P.L. 92-255). However, Petitioners alleged no violations of actual rights guaranteed them by either the Constitution or federal law. At best, they have presented a series of rules and regulations, assurances and guarantees of agreements running between N.I.D.A. and the Trustees concerning federal funding of the Boston Drug Treatment Program but vesting no private right of action in the Petitioners.

There is no constitutionally guaranteed right of a physician to be able to treat patients within the context of a particular program. No community is required to supply him with medical facilities for the treatment of a particular medical condition or disease. In modifying the drug program through eliminating two detoxification wards, a hot line, and a sheltered workshop/work training program, (Pet. App. A-5) the Trustees may have altered the type of tools available to the physicians but have not infringed upon any federally protected rights.

Furthermore, Petitioner patients here have no constitutionally or federally protected right to continued treatment within the confines of the particular programs which existed when they were accepted as patients. They have access to alternative drug programs and all other facilities of the Department of Health and Hospitals. This Court has properly not recognized a general constitutional right to treatment, *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975), yet Petitioner patients here assert a constitutional right to treatment within the confines of a particular program. Clearly, no such right exists.

2. Petitioner patients have no standing to allege violations of the terms of the contract between N.I.D.A. and the Trustees.

Petitioner patients lack standing to sue Respondents on the basis of contractual guarantees running between N.I.D.A. and the Trustees. The grant is governed by federal regulations

which are open to interpretation, negotiation and modification by N.I.D.A. on behalf of the Trustees. 45 C.F.R. Part 16. The agreement has, in fact, been modified to the satisfaction of both parties and the program continues on a smaller scale. Only two entities, the parties to the agreement, have standing to enforce it.

Petitioner patients, although within the zone of interests protected by the Drug Abuse Office and Treatment Act of 1972, have not suffered "injury in fact" and thus do not have standing to sue because alternative drug programs and hospital facilities are available to them. See, *Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970), *Barlow* v. *Collins*, 397 U.S. 159 (1970).

3. Petitioner Patch and other drug program employees have no standing to bring suit on behalf of themselves or their patients.

As the District Court said, the Petitioner staff members do not have an express right of action under the Drug Abuse Office and Treatment Act of 1972 and they are not within the zone of interest protected by that statute. Although the director signed the agreement at issue, he clearly did so "as an agent of the City, and the flow of mutual obligations runs between him and the United States, not between him and the City." (Pet. App. B-2) Therefore, the staff members have no standing to sue in their own behalf.

Furthermore, Petitioner Patch and the other employees do not have standing on behalf of their patients to bring this action. This Court has held that plaintiffs must generally assert their own legal rights and interests and cannot rest their claims to relief on the legal rights or interests of third parties. *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975). Even if the staff members were to prevail against this argument, they could not derive standing to sue from their patients for the latter

have no such right. Having suffered no "injury in fact," the patients have no standing to sue in their own behalf and thus may not grant it indirectly to the staff members.

The Petitioners cannot overcome a fatal flaw in their state court complaint, their first complaint in the District Court, and their amended complaint. N.I.D.A. is not a party. "The federal agency has not been made a party to the suit and, through the United States Attorney, has informed the Court that it does not desire to enforce the agreement through legal action." (Pet. App. B-2) The Petitioners cannot stand in the shoes of the other party to the grant contract. Since they cannot, they do not have standing to enforce its provisions.

II. THE PETITIONERS HAVE FAILED TO STATE A CLAIM OF A VIOLATION OF THEIR PROCEDURAL OR OTHER RIGHTS.

1. None of the Petitioners' procedural rights were violated by the lawful closure of some units of the program.

Petitioner patients erroneously claim that the closure of the drug treatment units without prior written notice or administrative review has violated procedural rights guaranteed them by the Drug Abuse Office and Treatment Act of 1972 and federal regulations promulgated thereunder. The regulation states:

> [I]n any case in which a decision is made that a *patient's treatment* . . . (is to) be terminated or substantially changed *by the program director* . . . *the patient* shall be given written notice of this fact and the right to have such decision reviewed in accordance with procedures established for that purpose. 21 C.F.R. § 1402.03(f). (Emphasis supplied.)

The Court of Appeals properly declined to apply this regulation to cases where entire units were being closed.

> [W]e agree with the District Court's conclusion that the regulation does not apply to decisions to close some units in a program. Such decisions are of a legislative nature, involving, as they do, the policy judgment as to whether the benefits to be derived from the continued operation of the units outweighs the costs. (Pet. App. A-8.)

This view of the regulation is supported by both the structure of the regulatory framework and the language used. The Court of Appeals correctly said that nothing in the regulation suggests that it was intended to create a forum to debate issues of policy. The hearings provided for must be narrow in scope, focusing on the particular fact of the patient's situation. The issue to be adjudicated in the hearing is whether a patient's situation has so changed that it is no longer appropriate for him to receive a particular type of treatment.

The language of the regulation also permits no other conclusion. The regulation refers to "a patient's treatment" and further states "the patient" shall be given written notice of termination or substantial change in his treatment and the right of review. By referring to "patient" in the singular, the regulation is clearly aimed at providing notice and hearing to the patient within an ongoing program whose individual treatment is to be substantially changed or terminated. The regulation is thus inapplicable to the termination of an entire program.

Plaintiffs cite *Glover* v. *McMurray*, 361 F. Supp. 236 (S.D.N.Y. 1973), for the proposition that a conflict between the circuits exists with respect to the necessity of providing individual pretermination hearings prior to closing an entire treatment unit. *Glover* is inapposite. There, individual pretermination hearings mandated by 45 C.F.R. §§205, 206 pursuant to the Social Security Act, 42 U.S.C. §602(a)(4) would have established the eligibility of parents to receive day care services and prevented the closing of the particular day care centers involved. Here, termination of parts of the program was based on a necessary centralization of services

and an overall cutback in city spending. Unlike *Glover*, the termination of services in the units involved here was not based on individual eligibility; the units would have closed regardless of any hearings. In any case, adequate alternative drug programs exist and are available to patient Petitioners.

Furthermore, no patient was deprived of his due process rights under the Fourteenth Amendment by Respondents' failure to provide pretermination notice and review. "Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Mathews* v. *Eldridge*, 424 U.S. 319, 334 (1976), citing *Cafeteria and Restaurant Workers' Local 473* v. *McElroy*, 367 U.S. 886 (1961).

As *Mathews* reveals, prior decisions of this Court indicate that resolution of what procedural protections are constitutionally due in a given situation requires consideration of three separate factors:

> [F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. 424 U.S. at 335.

The Petitioner patients here have no private interests which are adversely affected by the closing of the units because alternative drug programs are available to them. Petitioners cannot successfully allege an interest in treatment at any particular location particularly where, as here, the governmental interest in consolidation is so strong. Similarly, Petitioner patients suffered no risk of erroneous deprivation of any interest in treatment because termination was not based on individual eligibility, status or condition.

2. No substantive violations of patients' rights occurred because they have no private right of action under the contract between N.I.D.A. and the Trustees.

The Court of Appeals correctly sustained the holding of the District Court that patient Petitioners have no private right of action under the Drug Abuse Education Act of 1970. The maxim of statutory interpretation *expressio unius est exclusio alterius* applies here. Congress, in §507, provided for judicial review of any determination made by the Attorney General with respect to control and enforcement of the Act (Part II) and import and export of narcotics (Part III) but did not extend this provision to rehabilitation and treatment aspects of the Act (Part I). Thus, Congress did not intend to grant a private right of action to patients such as Petitioners here.

Petitioners seek to analogize their position to that of plaintiffs in *Euresti* v. *Stenner*, 458 F. 2d 1115 (5th Cir. 1972) and *Cook* v. *Ochsner Foundation Hospital*, 319 F. Supp. 603 (E.D. La. 1970), cases in which patients were found to have a private right of action to compel grantee hospitals to comply with the Hill-Burton Act, 42 U.S.C. §291 *et seq.* It is significant that other courts have refused to imply a private civil action under the Hill-Burton Act. *Stanturf* v. *Sipes*, 224 F. Supp. 883, 899 (W.D. Mo. 1963), aff'd 335 F. 2d 224 (8th Cir. 1964); *Matthews Et Ux* v. *Yale-New Haven Hospital*, 32 Conn. Sup. 539, 543 A. 2d 661 (1974), cert. den. 423 U.S. 1024 (1975). Furthermore, courts which have implied a private civil action under the Act have pointed to the statement of purpose in 42 U.S.C. §291 (a):

> to assist the several States in the carrying out of their programs for the construction and modernization of such public or other . . . hospitals . . . as may be necessary . . . *to furnish adequate hospital, clinic, or similar services to their people.* (Emphasis supplied.)

Thus, these courts have reasoned from the statutory purpose that the beneficiaries under the Act are persons requiring medical treatment.

The Drug Abuse Education Act of 1970 contains no such purpose to furnish any particular program of treatment to drug dependent persons. Section 2(b) of the Act states:

> It is the purpose of this Act to encourage the development of new and improved curricula on the problems of drug abuse; to demonstrate the use of such curricula in model educational programs and to evaluate the effectiveness thereof . . . .

It is clear that Congress intended that governmental entities have great leeway in establishing different kinds of drug programs and modifying or terminating them based on their effectiveness and the costs of their continued operation. The recognition of third-party action based on the Trustees' contract with N.I.D.A. would substantially reduce federal officials' flexibility in administering grants like that involved here. (Pet. App. A-11) Such a result would violate the express purpose of the Act, the continuous development of new and improved programs through an ongoing process of cost-benefit analysis.

While it is true that the United States General Accounting Office (GAO) and the Finance Commission of the City of Boston (FinCom) found administrative deficiencies in the operation of some parts of the program, it is important to note what the FinCom, a Boston fiscal watchdog agency, really said in the first page of its report. Petitioners, in their excerpts of the report on the management of various health funds, omit from their Appendix C the following:

> The Finance Commission has found ample grounds for criticism, but in the interest of avoiding sensationalism it should perhaps be stated at the outset what the Finance Commission did *not* find:

> (1) The Finance Commission found no evidence of theft or conversion to private use of the funds in question;
>
> (2) The Finance Commission found no indication that the officials responsible for the expenditure of the funds in question acted other than in good faith and in an honest attempt to carry out what they understood to be their duty.

All medical services to be provided under the grant were provided.

Each and every person in the program and every person in the City continues to have access to and to receive all medical services offered by the City of Boston. The Petitioners' complaint is that some services which they would like to have are not provided. This proposition is not sufficient to create a violation by the Respondent of any substantive right, nor is it sufficient to warrant the granting of their petition.

III. THE DISCHARGE OF THE PETITIONER PATCH DID NOT VIOLATE ANY OF HIS PROTECTED RIGHTS.

1. The Petitioner Patch did not have a property interest in his position which required procedural due process.

The Petitioner Patch (hereinafter Petitioner) assumed the directorship of the drug program with the permission of the Executive Director. Because neither the Board nor Trustees, Inc. appointed him to that position, he was an employee at will and could, therefore, be terminated at the will of the Executive Director. As an employee at will Petitioner has no federal right to Fourteenth Amendment procedural safeguards unless state or municipal law has created a legitimate claim of entitlement, *Roth* v. *Board of Education*, 408 U.S. 564, 577 (1972).

> It would stretch the concept too far to suggest that a person is deprived of liberty when he simply is not retained in one position but remains as free as before to seek another. This same conclusion applies to the dis-

> charge of a public employee whose position is terminable at the will of the employer when there is no public disclosure of the reasons for discharge. *Bishop* v. *Wood*, 426 U.S. 341, 348 (1976).

In his petition, Petitioner primarily relies on the bylaws of Boston City Hospital and Statutes 1885, chapter 266, section 5, as amended, to provide him with a claim of entitlement to something more than the termination he received. The Petitioner, of course, must establish that he had a substantive right to continue as director of the program. Both the District Court and the Court of Appeals were correct in concluding that the Petitioner had failed to show that these two provisions, even assuming that they had the force of "state law," provided Petitioner with any such right.

Statutes 1885, chapter 266, section 5, as amended, provides that every subordinate holds office until removed for cause. Section 5 of that chapter, as amended, defines subordinates " . . . only assistants, deputies, clerks and the officers, appointed by an officer or board in charge of a department and paid a yearly salary." The Petitioner is not such a subordinate nor was he appointed in the required manner. This statute does not apply to Petitioner as both courts below perceived.

Even if Petitioner's employment can be said to fit into the ordinance, dismissal for cause only does not automatically entitle an employee to constitutional protection. In *Arnett* v. *Kennedy*, 416 U.S. 134 (1974), a non-probationary civil servant was dismissed without a hearing under administrative regulations which provided removal only for cause. The Court held that "the right not to be discharged except for 'cause' did not create an expectancy of job retention in those employees requiring procedural protection under the due process clause beyond that afforded here by the statute and related agency regulations," *id.* at 134. Thus, where Statutes 1885, chapter 266, section 5, as amended, did not provide for any specific

procedures, an employee could be dismissed for cause, without a prior hearing.

Petitioner also looks to the Medical Staff Bylaws of Boston City Hospital (BCH), federal grant provisions, and various federal regulations for a legitimate claim of entitlement to a property interest in his employment. These allegations were not raised in the Petitioner's original complaint and under the doctrine of *Ellis* v. *Dixon*, 349 U.S. 458 (1954) a writ of certiorari may be dismissed or denied when the petitioner fails to allege certain facts in his original pleadings. In any case, both the District Court and First Circuit were correct in dismissing the complaint based upon these allegations.

The BCH Bylaws, Article III §7(b)(2) provide that a staff member is entitled to a hearing whenever circumstances affect his "appointment or status" on the staff. There has never been any change whatsoever in Petitioner's status as a physician at BCH.

As to the federal grant provisions and federal regulations, Petitioner has not bothered to explain these in his petition and the First Circuit was correct in summarily dismissing these claims. (See A-14 of Petitioners' Appendix.)

A writ of certiorari is granted only for "special and important reasons," U.S. Supreme Court Rule 19, *Rice* v. *Sioux City Cemetery*, 349 U.S. 70 (1954). In *Bishop* v. *Wood*, *supra*, Justice Rhenquist emphatically stated that:

> The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies . . . in the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutional rights we must presume that official action was regular, and if erroneous, can best be corrected in other ways. The due process clause is not a guarantee against incorrect or ill-advised personnel decisions, *id.* at 349–350.

2. Petitioner's dismissal did not violate his First Amendment rights.

Again, it must be pointed out that Petitioner did not raise this claim in the original complaint. The First Circuit stated:

> it is elementary that an appellant is not normally permitted to have the benefit of a new theory on appeal. While the court in its discretion may relax the rule to prevent a clear miscarriage of justice . . . this case strikes as an inappropriate one to deviate from the normal practice. (Pet. App. A-14).

Petitioner's private criticism of the fiscal and administrative policies of his employers is not within the protections of the First Amendment. The Petitioner's right to constitutional protection is limited by the "balance between the interests of the [public employee] as a citizen commenting upon matters of public concern, and the state as an employer, in promoting the efficiency of the public services through its employees." *Pickering* v. *Board of Education*, 391 U.S. 563 (1968) at 568. The Court in *Pickering* found a violation of First Amendment rights and clearly based its decision on the public nature of the plaintiff's communications in that case. None of those factors are present here. Petitioner's statements were not *public* speech but *private* communications directed toward his immediate supervisors with whom he was in frequent contact and daily conflict.

In a case, factually similar to the present one, *Roseman* v. *Indiana University of Pennsylvania, at Indiana*, 520 F.2d 1364 (1975), a state university teacher was dismissed after she had registered complaints against the chairman of her department. The Court held that she had no First Amendment protection in view of the essentially *private* nature of her statements in forums not open to the public and concerned with an issue of less public interest. In addition, the Court noted that her speech, like Petitioner's had a disruptive

impact, which was likely to interfere with the harmonious relations necessary to the efficient performance of public service.

Petitioner, after all, is a public employee. He is on the staff of a public hospital and was director of a municipal drug treatment program. But Petitioner's stated concerns about depressing public employees' First Amendment rights are misplaced. There is certainly a difference between valid criticism and speech which produces intolerable disharmony and dissension. Petitioner was not dismissed merely for his alleged refusal to distort program costs but for his lack of cooperation and the inefficiency and chaos he attempted to produce.

Petitioner is not the victim of a "clear miscarriage of justice," *Rolo-Lith Ltd.* v. *F. P. Bartlett and Co.*, 297 F. 2d 497, 500-501 (1st Cir. 1962). Rather he has had his day in the state court of Massachusetts, his day in the United States District Court, and his day in the United States Court of Appeals. Petitioner, contrary to the standards set forth by Sup. Ct. R. 19, seeks to waste the time and resources of this Court by bringing here issues never before the trial court, quarrels with policy decisions of various public officers and boards, and the misfortune of various drug-addicted persons. But the Petitioner cannot piggy-back himself any further than he has in the District Court or the Court of Appeals. This "unhappy tale of the administrative and other problems" (Pet. App. A-1) of Boston's drug treatment program brought this far by a former disgruntled employee, should be ended now.

CONCLUSION

For all the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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